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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
v.
CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AMERICAN FOREST & PAPER ASSOCIATION AMERICAN PETROLEUM INSTITUTE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE CHEMICAL MANUFACTURERS ASSOCIATION INTEGRATED WASTE SERVICES ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

SCOTT M. DUBOFF *
JOHN W. HEIDERSCHEIT III
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W.
Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae American Automobile Manufacturers Association, et al.

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Automobile Manufacturers Association, *et al.*, respectfully move this Court for leave to file a brief *amici curiae* in this case in support of the petition for a writ of certiorari filed by Union Oil Company of California ("Unocal"). The petition seeks review of the court of appeals decision in *Citizens for a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111 (9th Cir. 1996) (reproduced at Pet. App. 1a-17a). Counsel for the petitioner has consented to the filing of the above-mentioned brief *amici curiae*. Counsel for respondents Citizens for a Better Environment-California, *et al.*, withheld consent.*

1. *Amici* are organizations representing a broad cross section of industry in the United States.

* As the reason for withholding consent, respondents' counsel stated that respondents would not be able to reply to *amici*.

Amicus American Automobile Manufacturers Association ("AAMA") is a voluntary nonprofit association of domestic (United States) companies engaged in the manufacture and sale of motor vehicles. AAMA's members operate 276 manufacturing and related facilities, assemble approximately 80% of all motor vehicles produced in the United States, and have approximately 700,000 employees with a total annual payroll of over $35 billion.

Amicus American Forest & Paper Association ("AF&PA") is the national association of the forest, pulp, paper, paperboard, and wood products industry. With approximately 400 member companies and additional related associations, AF&PA represents a vital national industry employing some 1.4 million people and having an annual payroll of approximately $46 billion.

Amicus American Petroleum Institute ("API") is an association of over 300 companies involved in all aspects of the petroleum industry, including exploration, production, transportation, refining and marketing. API is a frequent advocate on important issues of public policy before courts, legislative bodies and other forums.

Amicus Bay Area League of Industrial Associations ("BALIA") is a diverse coalition of San Francisco Bay area industries established over 35 years ago for the purpose of addressing a broad range of environmental topics. BALIA represents its members' interests in air and water quality and solid waste management matters before various governmental forums.

Another of the *amici*, the California Council for Environmental and Economic Balance ("CCEEB"), is a private, non-profit coalition of organized labor and businesses in California. CCEEB was established in 1973 and has been an advocate for solutions to achieve California's environmental and economic goals.

Amicus Chemical Manufacturers Association ("CMA") is a non-profit trade association whose members represent more than 90% of domestic (United States) productive

capacity for basic industrial chemicals. CMA regularly advocates on public policy issues of importance to its members that arise before courts, legislative forums and regulatory agencies. The manufacturers of chemicals and allied products provide over one million jobs in the United States and account for over 10% of the value of goods exported from the United States.

Another of the *amici*, the Integrated Waste Services Association ("IWSA"), is a national trade group representing the waste-to-energy industry. IWSA encourages the use of waste-to-energy technology as a key component of community programs to handle solid waste. IWSA's member companies represent 65 of the 114 waste-to-energy facilities nationwide. IWSA member facilities process approximately 83,000 tons of waste each day and generate enough energy to meet the electricity needs of more than one million households.

Finally, *amicus* National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

2. Each of the *amici* has many members who, like petitioner, hold one or more National Pollutant Discharge Elimination System ("NPDES") permits issued pursuant to § 402 of the Clean Water Act ("Act"), 33 U.S.C. § 1342. These permits are administered by the U.S. Environmental Protection Agency ("EPA") and states to which EPA has delegated such permitting authority. NPDES permits regulate the discharge of pollutants to navigable waters of the United States. *See Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203-08 (1976).

While states have primary authority and responsibility to enforce the Clean Water Act, § 505 of the Act, 33 U.S.C. § 1365, also authorizes private enforcement. This case involves a suit under § 505.

Amici are committed to the goals of the Act. To that end, and in coordination with state and federal regulatory authorities, *amici's* member companies have spent vast sums to upgrade and enhance water pollution control technology at their facilities. Nevertheless, *amici's* member companies have been (or presently are) defendants in enforcement suits under § 505 of the Act, or have received notice, pursuant to § 505(b)(1)(A), that an individual or organization intends to file such a suit.

3. The fundamental issue raised by Unocal's petition is whether § 309(g)(6)(A) of the Act, 33 U.S.C. § 1319(g)(6)(A), allows duplicative private enforcement suits to be maintained where the affected state has already prosecuted a comprehensive administrative enforcement action that imposes a sizeable monetary penalty and other relief. *Amici* are directly interested in this case because the court of appeals' misinterpretation of § 309(g)(6)(A) would greatly expand citizens' authority to bring private enforcement suits under the Clean Water Act, and undercut the federalism principles central to the Act. Because *amici's* members are subject to regulation under the Clean Water Act and private enforcement actions under § 505, the issues raised by the instant petition for a writ of certiorari directly affect *amici*. The decision below seriously prejudices *amici's* members by expanding the jurisdiction of the federal courts to NPDES violations that have been fully and aggressively addressed by state enforcement agencies.

In the accompanying brief *amici* address these important issues from the perspective of diverse organizations representing industrial entities whose concerns regarding the decision below transcend this case. *Amici* believe that they can effectively contribute to the Court's understand-

ing of the broader ramifications of the court of appeals decision.

In view of the foregoing, *amici curiae* American Automobile Manufacturers Association, *et al.*, respectively request that they be permitted to file the accompanying brief *amici curiae* in support of petitioner Union Oil Company of California.

Respectfully submitted,

SCOTT M. DUBOFF *
JOHN W. HEIDERSCHEIT III
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W.
Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae American Automobile Manufacturers Association, et al.

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI*	3
REASONS FOR GRANTING THE WRIT	6
A. Contrary To The Ninth Circuit, The Regional Board's Enforcement Process Fully Satisfies § 309(g)'s "Comparability" Standard	7
1. In 1987 Congress Made a Deliberate Policy Choice To Limit Citizen Suits Where a State Enforces Administratively	7
2. The Ninth Circuit's Decision Conflicts with Decisions of the First and Eighth Circuits	10
B. The Ninth Circuit Sanctions Collateral Attack On State Enforcement, Thereby Jeopardizing The Primary Role Of The States In Enforcement Of The Act	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Arkansas Wildlife Fed'n v. Bekaert Corp., 791 F. Supp. 769 (W.D. Ark. 1992) 11

Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995) 2, 11, 13

Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 682 F. Supp. 1186 (N.D. Ala. 1988), *rev'd on other grounds*, 897 F.2d 1128 (11th Cir. 1990) 11

Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc., 777 F. Supp. 173 (D. Conn. 1991), *aff'd in rel. part, rev'd in part on other grounds*, 989 F.2d 1305 (2d Cir. 1993) 12

EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 5, 11

EPA v. City of Green Forest, 921 F.2d 1394 (8th Cir. 1990) 12

Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985) 7

Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) 6, 11-12, 13

North & S. Rivers Watershed Ass'n v. Town of Scituate, 755 F. Supp. 484 (D. Mass. 1991), *aff'd*, 949 F.2d 552 (1st Cir. 1991) 11

North & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991) 2, 11, 12

Saboe v. Oregon, 819 F. Supp. 914 (D. Or. 1993) .. 12

FEDERAL STATUTES

33 U.S.C.

§ 1251(a) 14
§ 1251(b) 11
§ 1319(g) 11
§ 1319(g)(1)-(5) 8
§ 1319(g)(6)(A) 2
§ 1342 5
§ 1365 2
§ 1365(b)(1)(B) 8

TABLE OF AUTHORITIES—Continued

STATE STATUTES	Page
Cal. Water Code	
§ 13301	9, 10
§ 13320	13
§ 13330	13
§ 13385	9, 10
OTHER SOURCES	
S. Rep. No. 92-914 (1971)	6, 12
133 Cong. Rec. S733 (daily ed. Jan. 14, 1987)	8
William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1 (1993)	13

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BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AMERICAN FOREST & PAPER ASSOCIATION AMERICAN PETROLEUM INSTITUTE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE CHEMICAL MANUFACTURERS ASSOCIATION INTEGRATED WASTE SERVICES ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

This brief *amici curiae* of American Automobile Manufacturers Association, *et al.*, is submitted in support of a petition for a writ of certiorari filed by Union Oil Company of California ("Unocal"). The petition seeks review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Citizens for a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111 (9th Cir. 1996) (reproduced at Pet. App. 1a-17a).

The court of appeals decision concerns a private enforcement action ("citizen suit") under § 505 of the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1365, and, in particular, interpretation of § 309(g)(6)(A) of the Act, 33 U.S.C. § 1319(g)(6)(A).[1] The Ninth Circuit's decision would allow a private enforcement action to be maintained despite the fact that the affected state has previously undertaken a comprehensive administrative enforcement action resulting in a settlement that imposes a very sizable monetary sanction or penalty. The decision directly conflicts with the decisions of two other circuits, *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995), and *North & South Rivers Watershed Association, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). In addition, the Ninth Circuit's decision directly contravenes Congress' intent—as well as Supreme Court precedent—that individual states are to have the primary role in enforcing the Clean Water Act. The court of appeals decision severely undermines the role intended for state administrative enforcement, including jeopardizing

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[1] The relevant portion of § 309(g) provides as follows:

> (6) Effect of order
>
> (A) Limitation on actions under other sections
>
> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—
>
> ....
>
> (ii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

the opportunity to achieve administrative settlements, while at the same time increasing the likelihood of costly, duplicative and protracted district court litigation. Given the recurring nature of these issues, it is of considerable importance that this Court resolve the conflict among the circuits regarding the respective roles for state enforcement and citizen suits.

The petitioner has consented to the filing of this brief and petitioner's letter of consent has been filed with the Clerk of the Court. Respondents Citizens for a Better Environment, *et al.* ("CBE") have not consented, and *amici* have simultaneously filed a motion for leave to file this brief.

STATEMENT OF INTEREST OF *AMICI*

Amici consist of voluntary business associations representing a broad spectrum of industry in the United States.

Amicus American Automobile Manufacturers Association ("AAMA") is a voluntary nonprofit association of domestic (United States) companies engaged in the manufacture and sale of motor vehicles. AAMA's members operate 276 manufacturing and related facilities, assemble approximately 80% of all motor vehicles produced in the United States and have approximately 700,000 employees with an annual payroll of over $35 billion.

Amicus American Forest & Paper Association ("AF&PA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. AF&PA represents approximately 400 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recycled fiber; and produce solid wood products. Additionally, AF&PA represents a vital national industry which accounts for over 8% of the United States' total manufacturing output. Employing

some 1.4 million people, this industry ranks among the top ten manufacturing employers in 46 states, with an annual payroll of approximately $46 billion.

Amicus American Petroleum Institute ("API") is a trade association whose membership includes over 300 companies involved in all aspects of the petroleum industry, including exploration, production, transportation, refining and marketing. API is a frequent advocate on important issues of public policy before courts, legislative bodies and other forums.

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Another of the *amici*, the California Council for Environmental and Economic Balance ("CCEEB"), is a private, non-profit coalition of organized labor and businesses in California. CCEEB was established in 1973 and has been an advocate for solutions to achieve California's environmental and economic goals.

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Amicus Integrated Waste Services Association ("IWSA") is a national trade group representing the

waste-to-energy industry. IWSA encourages the use of waste-to-energy technology as a key component of community programs to handle solid waste. IWSA's member companies represent 65 of the 114 waste-to-energy facilities nationwide. IWSA member facilities process approximately 83,000 tons of waste each day and generate enough energy to meet the electricity needs of more than one million households.

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Amici have a substantial interest in the issues raised by the petition in this case. The Ninth Circuit's decision will subject Clean Water Act permittees to duplicative enforcement—federal court actions on the heels of state administrative enforcement—for precisely the same conduct.[2] While *amici's* members have invested billions of dollars in water pollution control, no system can guarantee perfect compliance and *amici's* members are at times subject to enforcement actions by state and federal regu-

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[2] The 1972 amendments to the Clean Water Act established the National Pollutant Discharge Elimination System ("NPDES"). The NPDES program is based on a system of permits that regulate the discharge of pollutants into navigable waters of the United States. The permit system is administered by the U.S. Environmental Protection Agency ("EPA") and the various states, including California, to which administration of the permit program has been delegated. *See* § 402 of the Act, 33 U.S.C. § 1342; *see also EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205-08 (1976). At this time there are 39 states with delegated authority to administer the NPDES program and more than 75,000 NPDES permits in effect. http://www.epa.gov:80.

lators. But as a consequence of the Ninth Circuit's decision, NPDES permittees who settle enforcement actions with state agencies will nevertheless be subject to citizen suits—and additional penalties—for the very same matters. This is true even if these permittees make continuing good faith efforts to achieve compliance with permit requirements and pay administrative penalties as part of the resolution of enforcement proceedings.

The Ninth Circuit's decision will significantly erode the incentive for defendants to settle state administrative actions by offering significant environmental improvements and the payment of substantial penalties where a duplicative citizen suit looms on the horizon. These issues, which underlie the petition for a writ of certiorari, are important and recurring questions in the administration of the Clean Water Act and merit review by this Court.

REASONS FOR GRANTING THE WRIT

Unocal's petition addresses the fundamental issue of the respective roles in CWA enforcement that Congress intended for states and citizen plaintiffs. The question presented is whether Congress intended that citizen plaintiffs could bring an enforcement action under the Clean Water Act where a prior state administrative action has resulted in a substantial monetary penalty, the development of new control technology and strict adherence to compliance schedules. The Ninth Circuit's decision is contrary to this Court's conclusion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that citizen suits,

> are proper only "if the Federal, State, and local agencies *fail* to exercise their enforcement responsibility."

Id. at 60 (emphasis added) (quoting S. Rep. No. 92-414, at 64 (1971)). The Ninth Circuit allows an entirely duplicative citizen suit to proceed in federal court despite

the fact that the identical issues have been thoroughly addressed in a prior administrative enforcement proceeding before the California Regional Water Quality Control Board ("Regional Board") under a state enforcement code that is "comparable" to the provisions of the CWA governing EPA's administrative enforcement. The Ninth Circuit disregards these factors and, as a consequence, undermines federalism and a principal theme of the CWA —the primary authority and responsibility of the states in enforcement of the Clean Water Act.

A. Contrary To The Ninth Circuit, The Regional Board's Enforcement Process Fully Satisfies § 309(g)'s "Comparability" Standard

The Ninth Circuit concluded that the Regional Board's enforcement action against Unocal did not proceed under a "comparable State Law" within the meaning of § 309(g)(6)(A)(iii) of the Clean Water Act. That conclusion is based on the erroneous premise that the CWA requires the Regional Board to proceed under enforcement provisions that are identical to the CWA provisions governing EPA's administrative enforcement under § 309(g).

1. *In 1987 Congress Made a Deliberate Policy Choice To Limit Citizen Suits Where a State Enforces Administratively*

The purpose of § 309(g)(6)(A) is to avoid duplicative enforcement actions by citizen plaintiffs where there has already been diligent administrative enforcement by either the affected state or the federal government. Prior to the 1987 amendments to the CWA only a state or federal judicial enforcement action could bar a duplicative citizen suit for the same alleged NPDES violations.[3] The 1987

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[3] *See Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985). Prior to the 1987 amendments that added § 309(g), the CWA's only provision for barring a duplicative citi-

amendments expanded the limitation on citizen suits to include state and federal administrative enforcement. The amendments established that state administrative enforcement actions would thereafter preclude duplicative citizen suits, provided that the state's administrative enforcement procedures are comparable to the CWA's procedures for EPA administrative enforcement, *e.g.*, public participation, the availability of monetary penalties, and opportunity for judicial review.[4] It bears emphasis that the plain meaning of the term "comparable" in the statute is that a state's administrative enforcement procedures are "similar" or "analogous"—but not necessarily identical—to the section 309(g) procedures that apply to administrative enforcement by EPA.[5] Clearly, Congress did not intend to impose a litmus test or exalt form over substance.

The Ninth Circuit, however, ignored the direction of Congress in the 1987 amendments and disregarded the plain language of the statute. Nowhere does the court explain why the Regional Board's administrative enforcement procedures in this case were not comparable to the administrative enforcement procedures that apply to EPA under § 309(g). To the contrary, the procedures fol-

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zen suit was set forth in § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B), which precludes a citizen suit if at the time of the suit an enforcement action in state or federal court is being diligently prosecuted by the affected state or EPA. The 1987 amendments that added § 309(g) also made a conforming amendment to § 505(a) to clarify that citizen suits would thereafter be precluded both by judicial enforcement (§ 505(b)(1)(B)) *and* administrative enforcement (§ 309(g)(6)(A)).

[4] The 1987 amendments added administrative penalty provisions to EPA's CWA administrative enforcement authority, which had previously been limited to issuance of compliance orders. *See, e.g.*, 33 U.S.C. § 1319(g)(1)-(5).

[5] *See* 133 Cong. Rec. S733 (daily ed. Jan. 14, 1987) (comments of Sen. Chafee that a state's administrative procedures must be "similar" or "analogous" to those in § 309(g)).

lowed by the Regional Board were quite similar or analogous to those set forth in CWA § 309(g). The Ninth Circuit suggested that the provision relied on in this case by the Regional Board, § 13301 of the California Water Code, provides "no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude." Pet. App. 12a. That position is baseless. The Regional Board, acting pursuant to § 13301 and related authority, provided abundant public notice and opportunity to comment, held two public hearings (CBE actively participated in both), and imposed a very substantial monetary sanction—a penalty—of $2,000,000 ($780,000 of which was paid by Unocal). *See* Pet. at 4-5.

The Ninth Circuit concluded that Unocal's $780,000 payment did not qualify as an enforcement penalty under § 309(g)(6)(A)(iii), suggesting that the "fairest characterization of the payment at issue is that it was, indeed, a settlement made to *avoid an enforcement* action by the Regional Board" and accordingly, was "not paid [as] a penalty." Pet. App. 9a (emphasis added). The Regional Board's proceeding against Unocal was an enforcement action, however, and was recognized as such by both the Regional Board and EPA. Excerpts of Record ("ER") 158, 253. The Regional Board and EPA also recognized that the $2,000,000 payment was a penalty. ER 140, line 5; ER 253-54; ER 371, lines 8-15.

Disregarding these facts, the Ninth Circuit emphasized instead that § 13301 of the California Water Code, unlike § 13385 of the Code, does not expressly authorize the assessment of administrative penalties. The court further suggested that the result of the Regional Board's reliance on § 13301 was to provide Unocal with "significant advantages" because the "significant level of scrutiny" that is applied to administrative penalties under § 13385 was avoided. Pet. App. 8a. Contrary to the Circuit's implica-

tion, however, neither CBE nor any other participant in the Regional Board's enforcement proceeding suggested that the Board's reliance on § 13301 rather than § 13385 had reduced or otherwise impaired the level of scrutiny associated with the Regional Board's assessment of the $2,000,000 penalty. The penalty paid by Unocal (and the other refiners) was very carefully scrutinized by the Regional Board, EPA, the respondents, and other members of the public, including two public hearings in which respondents fully participated. ER 113-52; ER 253-54; ER 371, lines 8-15. Indeed, the portion of the $2,000,000 penalty that Unocal itself paid ($780,000) was five times the maximum administrative penalty available under the comparable Clean Water Act provision.

2. *The Ninth Circuit's Decision Conflicts with Decisions of the First and Eighth Circuits*

The Ninth Circuit's conclusion that § 13301 of the California Water Code is not "comparable" to § 309(g) of the Clean Water Act conflicts with each of the two other court of appeals decisions that have interpreted that provision. The federal courts interpreting § 309(g)(6)(A) recognize that the Clean Water Act's "comparability" requirement is satisfied where the state's enforcement procedures are similar to federal enforcement procedure:

> The common thread running through these cases is a finding that the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA. . . . [T]he comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Arkansas Wildlife, 29 F.3d at 381. Thus, "while not identical," state administrative enforcement procedures must be "sufficiently similar" to federal procedures to satisfy § 309(g)(6)(A)'s comparability standard.[6] These decisions emphasize "the comparability of the overall state regulatory scheme rather than the individual section of state law," *Arkansas Wildlife Fed'n v. Bekaert Corp.*, 791 F. Supp. 769, 774-75 (W.D. Ark. 1992), which is satisfied where "the overall scheme of the two acts [the CWA and the parallel state law] is aimed at correcting the same violations, thereby achieving the same goals." *North & S. Rivers*, 949 F.2d at 556. In sum, the Ninth Circuit's decision is inconsistent with these principles and creates a split of authority on an important issue with significant consequences for *amici* and others.

B. The Ninth Circuit Sanctions Collateral Attack On State Enforcement, Thereby Jeopardizing The Primary Role Of The States In Enforcement Of The Act

As this Court has long recognized, a principal congressional policy underlying the Clean Water Act is " 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.' " *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 207-08 (quoting § 101(b) of the Act, 33 U.S.C. § 1251(b)). As this Court and other courts have recognized, the legislative history and implementation of the Act repeatedly emphasize Congress' intent that states have preeminent responsibility for the Act's enforcement. *Gwaltney*, 484 U.S. at

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[6] *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 755 F. Supp. 484, 486 (D. Mass. 1991), *aff'd*, 949 F.2d 552 (1st Cir. 1991); *see also Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1886, 1188 (N.D. Ala. 1988) (providing that a "a state administrative action under a similar state law is clearly sufficient, such action being under a state law comparable to subsection (g) of § 1319"), *rev'd on other grounds*, 897 F.2d 1128 (11th Cir. 1990).

60.[7] In contrast, citizen suits are intended to "supplement rather than to supplant" government enforcement, and "are proper only 'if the Federal, State, and local agencies *fail* to exercise their enforcement responsibility.'" *Gwaltney*, 484 U.S. at 60.[8]

The Ninth Circuit's decision, however, expands the role of federal court citizen suits at the expense of state authority. Allowing vigorous state administrative enforcement actions that assess substantial penalties to be subordinated and confined to an inconsequential role will seriously undermine state enforcement of the Clean Water Act. As a consequence, settlement of administrative enforcement actions will lack finality and may have little, if any, significance, regardless of procedures for public participation and judicial review, authority to impose stringent penalties and corrective measures, or the severity of the sanctions imposed. This can only result in discouraging out-of-court settlements between NPDES permittees and state agencies since the "incentive to settle would be greatly diminished if subsequent citizen suits were allowed." *Connecticut Coastal Fishermen's Ass'n*, 777 F. Supp. at 186.[9]

In the truest sense, the Ninth Circuit decision validates a collateral attack on the Regional Board's enforcement

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[7] *See also Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 177-78 (D. Conn. 1991), *aff'd in rel. part & rev'd in part on other grounds*, 989 F.2d 1305 (2d Cir. 1993); *EPA v. City of Green Forest*, 921 F.2d 1394, 1403-05 (8th Cir. 1990).

[8] Quoting S. Rep. No. 92-414, at 64 (1971) (emphasis added); *see also Gwaltney*, 484 U.S. at 53 ("[i]n the absence of federal or state enforcement, private citizens may commence civil actions" under § 505).

[9] *See also Saboe v. Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993) (a violator will not cooperate with the administrative enforcement process absent "assurance that the same violation would not be the subject of a citizens suit in federal court at some later time").

discretion and the diligently prosecuted enforcement action against Unocal. CBE actively participated in the Regional Board's enforcement proceeding, ER 43-60; ER 113-52; ER 153-59; ER 253-55, and advocated that larger penalty payments be imposed, ER 137-38. CBE could have sought further administrative review by the California Water Resources Control Board and judicial review in the California courts. *See* Cal. Water Code §§ 13320, 13330. Instead, CBE made a conscious decision to ignore these comprehensive state remedies. CBE's choice is strikingly similar to the circumstances in the *Arkansas Wildlife* case, in which the Eighth Circuit concluded "AWF could have intervened in the administrative process but instead chose to collaterally attack the enforcement action through this federal lawsuit. We have no reason to believe that AWF would have been denied meaningful participation . . . ." 29 F.3d at 382. The same holds true for CBE.

Finally, by allowing CBE to maintain another duplicative enforcement action the Ninth Circuit disregards this Court's admonition in *Gwaltney*, 484 U.S. at 60-61, that states have primary authority and discretion to enforce the Act.[10] In short, the federal court suit at issue here, which is entirely duplicative of the State of California's diligent administrative enforcement action against Unocal and others, should have been dismissed. Simply stated:

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[10] *See also* William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 5-8 (1993):

> Federal courts were intended to complement state court systems, not supplant them.
>
> . . . .
>
> . . . In determining the proper allocation of jurisdiction between state and federal courts, we need to view our federal and state systems as one resource to be used as wisely and efficiently as we can. By eliminating duplicative effort, unnecessary friction and inefficient allocations of jurisdiction, state and federal systems can contribute to each other's well being and the entire system can gain.

> [T]he goal of all actions brought under the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts.

North & S. Rivers, 949 F.2d at 556. That is the case here as well—duplicative citizen suits like CBE's will thwart the goals of the Clean Water Act.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

SCOTT M. DUBOFF *
JOHN W. HEIDERSCHEIT III
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W.
Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae American Automobile Manufacturers Association, et al.

* Counsel of Record